



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Digital Commons @ Touro Law  
Center**

---

Scholarly Works

Faculty Scholarship

---

1997

## **Immigration Laws as Instruments of Discrimination: Legislation Designed to Limit Chinese Immigration into the United Kingdom**

Richard Klein

*Touro Law Center*, [richardk@tourolaw.edu](mailto:richardk@tourolaw.edu)

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Immigration Law Commons](#), and the [International Law Commons](#)

---

### **Recommended Citation**

7 Touro Int'l L. Rev. 1 (1997)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# **IMMIGRATION LAWS AS INSTRUMENTS OF DISCRIMINATION: LEGISLATION DESIGNED TO LIMIT CHINESE IMMIGRATION INTO THE UNITED KINGDOM**

**Richard Klein\***

## **CONTENTS**

<b>INTRODUCTION.....</b>	<b>2</b>
<b>I. A COMPARATIVE PERSPECTIVE.....</b>	<b>5</b>
A. FRANCE: LEGISLATION RELATING TO IMMIGRATION FROM THE FORMER FRENCH COLONIES .....	6
B. GERMANY: IMMIGRATION, CITIZENSHIP AND NATURALIZATION OF THE NON-EUROPEAN IMMIGRANT.....	15
<b>II. THE INTRODUCTION OF LEGISLATION TO RESTRICT IMMIGRATION TO GREAT BRITAIN.....</b>	<b>17</b>
A. THE TREATMENT OF THE CHINESE.....	17
B. ENACTMENT OF LEGISLATION TO FAVOR IMMIGRANTS FROM GIBRALTAR AND THE FALKLAND ISLANDS .....	22
C. THE RESPONSE IN HONG KONG .....	25
<b>III. THE YEARS AFTER THE BRITISH-CHINA ACCORD .....</b>	<b>28</b>
A. REPERCUSSIONS OF TIANANMEN SQUARE.....	29
B. THE IMPACT OF THE REPORT OF THE FOREIGN AFFAIRS COMMITTEE.....	37
C. THE FINAL STAGES OF BRITISH RULE .....	43
<b>CONCLUSION .....</b>	<b>52</b>

---

\* J.D., Harvard Law School, 1972; Professor of Law, Touro College, Jacob D. Fuchsberg Law Center.

## INTRODUCTION

The use by Great Britain of immigration legislation to restrict the entry of Chinese people into Britain is an illustration of the utilization of such laws to discriminate against a group of individuals based on their race. Great Britain first seized control of Hong Kong Island in 1842, after becoming the victor in the First Opium War.<sup>1</sup> The resultant Treaty of Nanking provided for "the island of Hong Kong to be possessed *in perpetuity* by her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain [should] see fit to direct."<sup>2</sup> Hong Kong had been the center for the smuggling of opium into China before the Opium

---

1. The sale of opium to the Chinese had been an important source of revenue to the British since the Government took over the East India Trading Company in 1813. In 1833, Parliament passed legislation opening the trade to all British merchants, and British entrepreneurs came to China "like bees in a honey pot" to obtain part of the ever-increasing opium market. JACK BEECHING, *THE CHINESE OPIUM WARS* 20 (1975). The Chinese Emperor had officially banned the importation of opium since Emperor Yang Cheng proclaimed the first anti-opium edict in 1729. A DATE WITH FATE 13 (1984) (published anonymously). To the Chinese, opium use was in conflict with the Confucian mandate to keep one's body, which was the vital link to one's ancestors and descendants, pure. The British traders ignored the Chinese outlawing of opium importation and "put their Edicts in the wastepaper basket." MAURICE COLLIS, *FOREIGN MUD* 210 (1946). In 1839, the Emperor appointed a special Imperial Commissioner to take charge of the illegal sales by the British, and the First Opium War began after the Commissioner seized over four million pounds of opium from British traders and threw it into the sea. ARTHUR WALEY, *THE OPIUM WAR THROUGH CHINESE EYES* 232 (1958).

2. 30 *BRITISH AND FOREIGN STATE PAPERS* 389, 390, *reprinted in* 93 *PARRY'S T.S.* 465, 467 (1979)(emphasis added). Hong Kong became a Crown Colony upon ratification of the Treaty in 1843. The population at the time was estimated to be between 2,500 to 7,500. D. M. Emyrs Evans, *Aliens on British Soil*, *H.K.L.J.* 205, 206 (1978).

War and within a few years after the Treaty, according to the second Governor of Hong Kong, "almost every person possessed of capital who is not connected with government employment, [was] employed in the opium trade."<sup>3</sup>

As the population in Hong Kong Island increased, Great Britain wanted to possess Kowloon, an area of the Chinese mainland directly across the bay. Kowloon is not as mountainous as Hong Kong Island and, therefore, better suited for building. Furthermore, as the British commander of the land force in China stated, "the occupation of the [Kowloon] Peninsula was absolutely essential to the security of the Island."<sup>4</sup> And with amazing foresight about what was to prove so vital to Hong Kong's future spectacular growth, the chief officer of the East India Company wrote of the desirability to acquire the 'beautiful harbour' of Kowloon: "In all points both of facility of egress and ingress, and in its perfectly land locked situation, this harbour can hardly have a superior in the world."<sup>5</sup> The Manchu Dynasty in China refused to cede Kowloon to Britain and after war broke out and as British troops neared Peking in 1860, the Convention of Peking was signed providing for Kowloon to become part of the Crown of the Colony of Hong Kong, in perpetuity.<sup>6</sup>

What is currently referred to as Hong Kong was not completely formed until 1898. China had become severely weakened as a result of the Sino-Japanese War of 1894-95 and was able to

---

3. G. B. ENDACOTT, *A HISTORY OF HONG KONG* 73 (1958). The number of chests of opium brought from Hong Kong into China increased from 20,000 in 1839, to 85,000 by 1960. MAURICE COLLIS, *FOREIGN MUD* 309 (1946).

4. GERALD GRAHAM, *THE CHINA STATION, WAR AND DIPLOMACY: 1830-1860*, 386 (1978).

5. H. H. LINDSAY, *REPORT OF THE PROCEEDINGS ON A VOYAGE TO THE NORTHERN PARTS OF CHINA IN THE SHIP AMHERST 1* (1833).

6. 50 *BRITISH AND FOREIGN STATE PAPERS* 10, *reprinted in* 123 *PARRY'S T.S.* 71 (1979). The actual language of the Convention ceded Kowloon to Her Majesty the Queen "to have and hold as a dependency" with no time limit. *Id.* at 73.

provide little military opposition to seizure of more land.<sup>7</sup> The 'New Territories' were a part of the Chinese mainland and were contiguous to Kowloon. The language of the treaty between China and Great Britain providing for the annexation of the territory explained one rationale for Britain's desire for the land: "An extension of Hong Kong Territory is necessary for the proper defense and protection of the Colony."<sup>8</sup> If the New Territories had been ceded in perpetuity to Britain as had Hong Kong Island, then the colony of Hong Kong might very well still be a part of Great Britain. Britain, however, did not have the foresight that may have proven valuable in 1997, and instead only arranged to lease the New Territories for a term of 99 years -- to expire on July 1, 1997. Although the administrative and financial headquarters of Hong Kong have been throughout the years centered on Hong Kong Island, and the commercial activity dominated by Kowloon, the New Territories constituted 365 of the 400 square miles of the colony. The area that was leased only until 1997 had thus become such a basic part of the entire Colony that Britain concluded that when the lease was to expire, all the land comprising Hong Kong would be given back to China. In 1984, Britain and China signed the *Draft Agreement Between the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of*

---

7. Support for the acquisition came from the Hong Kong Chamber of Commerce. See GEOFFREY ROBLEY SAYER, HONG KONG 1862-1919, YEARS OF DISCRETION 81 (1975); PETER WESLEY SMITH, UNEQUAL TREATY: 1898-1997, CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES 11 (1980).

8. THE CONVENTION BETWEEN GREAT BRITAIN AND CHINA RESPECTING AN EXTENSION OF HONG KONG TERRITORY, June 9, 1898, 186 CONSOL. T.S. 310, 311.

*Hong Kong*<sup>9</sup> which provided for all of Hong Kong to become a Special Administrative Region of China as of July, 1, 1997.<sup>10</sup>

## I. A COMPARATIVE PERSPECTIVE

In order to provide a proper context for this article's analysis of the manner in which Britain enacted legislation to deal with the immigration of Chinese from Hong Kong, a brief overview is being provided of the response of other European powers to immigrants from non-European lands. Immigration policy has become a highly politicized issue throughout Europe. The issue is no longer one dealt with only by low-level governmental officials; candidates for heads of state often present immigration concerns as primary issues of their political campaigns. Considerations of what would constitute appropriate immigration legislation is on the agenda of the Group of Seven industrialized nations, has been discussed by the Trevi Group of European Justice and Interior Ministers, and has been a focus in the

---

9. See DRAFT AGREEMENT *infra* note 86.

10. The authority for designating Hong Kong as a Special Administrative Region of China comes from Article 31 of the Constitution of the Peoples Republic of China: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions." The Hong Kong Special Administrative Region is to have a "high degree of autonomy except in the areas of defense and foreign affairs." XIANFA [Constitution] art. 31 (1982). China has pledged to permit Hong Kong to continue its capitalist economy for a period of fifty years, and has often referred to its policy *vis a vis* Hong Kong as a "one country, two systems" approach. DRAFT AGREEMENT *infra* note 86, at § 3(5). China developed the policy in order to encourage stability in Hong Kong and to ease fears about the PRC arbitrarily imposing the laws of the mainland. THE ELABORATION BY THE GOVERNMENT OF THE PEOPLES REPUBLIC OF CHINA OF ITS BASIC POLICIES REGARDING HONG KONG (Sept. 1984) pledges that "after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practiced ... and that Hong Kong's lifestyle shall remain unchanged for fifty years." at § 1.

Helsinki process.<sup>11</sup> Immigrants are perceived by many in Western Europe (and perhaps in the United States as well) as posing an increasing threat to the integrity and economic well-being of the state. Ethnocentrism and xenophobia are dominating the debate.<sup>12</sup>

*A. France: Legislation Relating to Immigration from the Former French Colonies*

France's primary colonial settlements were in Algeria, Vietnam, and some sub-Saharan countries in West Africa. Tunisia, Morocco, and Laos were protectorates. French became widely spoken in the colonies and citizens from those areas fought as members of the French military in both World War I and II. The imposition of the French culture, education, and political institutions on the colonies made the initial acceptance of immigrants from those areas after decolonization easy for the French to accept.

French citizenship for immigrants has been based, historically on a policy of *jus soli*,<sup>13</sup> a system which automatically

---

11. SARAH COLLINSON, BEYOND BORDERS, WEST EUROPEAN MIGRATION POLICY TOWARDS THE 21ST CENTURY 5 (1993).

12. The nastiness of the debate can be illustrated by the comments of former President of France Jacques Chirac, referring to the "noise and smells" of the immigrants in France. *Zero option: France*, THE ECONOMIST, June 12, 1993, at 57.

13. This policy of "nationality through place of birth" was based on the concept of there being a French national identity which is developed by the sharing of French culture from childhood. The only other country in continental Europe which automatically grants citizenship on the basis of birth

transformed immigrants into citizens. In 1851, *jus soli* was introduced for third-generation immigrants, and in 1889 it was extended to encompass second-generation aliens.<sup>14</sup> A liberal policy towards immigrants was certainly appropriate for the country whose Revolution championed Liberty, Fraternity, Equality and gave birth to the Universal Declaration of the Rights of Man.

The economic expansion which occurred in France in the 1960s and mid-1970s, created the need for large numbers of unskilled laborers, and immigrants therefore were welcome.<sup>15</sup> Algeria became independent in 1962, and the residents were able to immigrate to France without restriction.<sup>16</sup> However as

---

to a foreign-born resident is Portugal. See ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 224 (1992).

14. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 80-81 (1992). Any person born in France of French parents who were foreigners becomes a French citizen upon the age of 18 if that person has been residing in France. NATIONALITY CODE Article 36. The NATIONALITY CODE provides for such individuals to lose their nationality if within ten years of attaining citizenship, an individual is convicted of a crime against the security of the state. *Id.* at Art. 109.

15. To some extent, since the end of the nineteenth century the low rate of population growth within France was of concern not only as to a diminished labor market inhibiting economic development, but also as to a lessening of the overall strength of the French military. See Philip Ogden, *The Legacy of Migration: Some Evidence from France* in MASS MIGRATION IN EUROPE: THE LEGACY AND THE FUTURE 111 (Russell King ed., 1993).

16. Independence in Algeria was achieved only as a result of a costly and bitter war with France. After independence was declared, Algerians, whether living in France or Algeria, had to choose either French or Algerian citizenship. Almost all Algerians residing in France chose Algerian



unemployment amongst French workers increased in the early 1970s and the newly arrived immigrants were targeted for blame, a new institution was formed. The Secretariat d'Etat aux Travailleurs Imigres (the Secretary of State for Immigrant Workers) initially attempted to stop all new immigration,<sup>17</sup> but as that policy failed, there was an attempt to have forced repatriation of Algerian workers.<sup>18</sup> The French Government, however, did not seek approval of these policies from the legislature, and the judiciary, notably the Council of State, declared these policies null and void.<sup>19</sup>

---

citizenship. See BRUBAKER *supra* note 13, at 139. The *Evian Agreement of 1962* provided guarantees of free movement between Algeria and France.

17. Gilles Verbunt, *France in EUROPEAN IMMIGRATION POLICY* 137 (Tomas Hammar ed., 1985). By the mid-1970s, immigration had reached new highs and large numbers of children were being born in France to foreigners. See BRUBAKER *supra* note 13, at 143. As capital-intensive industries replaced labor-intensive ones, the need for foreign workers decreased.

18. JAMES HOLLIFIELD, *Immigration and Republicanism in France: The Hidden Consensus* in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 156-57 (WAYNE CORNELIUS, PHILIP L. MARTIN, JAMES HOLLIFIELD eds., 1994). The status of the Algerian immigrant in France had been governed by the Franco-Algerian Agreement of June 27, 1968. For a period of time beginning in 1973, Algeria voluntarily suspended migration to France because of increasing physical and verbal attacks on Algerians by the French. STEPHEN CASTLES AND MARK MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* 234 (1993).

19. *Id.* at 157. The Council's holding was based on the opinion that the executive could not unilaterally make policies to suspend worker immigration. *Id.* The Council of State is the highest administrative court of appeal in the French judicial system.

France's immigration policies have led to highly charged political conflicts. The right-wing National Front focused on its call to keep France for the French, whereas the left proposed allowing resident aliens to vote in local elections.<sup>20</sup> When the rightist Jacques Chirac was elected to lead France in 1986, there was an unsuccessful attempt to amend the Nationality Code<sup>21</sup> to increase the police powers over immigration and to restrict the ease with which second-generation Algerian immigrants could attain citizenship.<sup>22</sup> The Chirac government lasted only for two years, but even though the Socialist Francois Mitterand was elected President in 1988,<sup>23</sup> the anti-immigrant National Front leader, Jean-Marie LePen received 14.5% of the vote.<sup>24</sup> The

---

20. HOLLIFIELD *supra* note 18, at 163.

21. Issues of citizenship and nationality are governed by the NATIONALITY CODE as amended by Law Number 73-42 of January 9, 1973.

22. See Ogden, *supra* note 15, at 112. The amendments would have restricted automatic attainment of citizenship upon reaching 18 years of age. The nationalistic legislation spurred the growth of groups concerned about protecting the rights of immigrants, especially as to residency and employment concerns.

23. Francois Mitterand was initially elected President in 1981.

24. *Id.* at 164. The 14.5% was not fully indicative of the xenophobic, anti-immigrant attitudes of the French; opinion poles showed almost 33% of the populace supported the National Front's zero-immigration stance. *Id.* at 164-65. The widespread anti-immigrant sentiment permitted right-wing political groups willing to exploit the antagonism to gain a degree of support long denied to the right.

negative attitudes of the French towards the immigrants, especially the Algerian Arabs,<sup>25</sup> is probably rooted in the different culture, religion and dress, and exacerbated by the fact that the Algerians have not attained an economic level that approaches that of the French.<sup>26</sup> Unlike the white immigrants from elsewhere in Europe who were deemed by French policy-makers to be desirable immigrants, those from North Africa are increasingly seen as undesirable.<sup>27</sup> The Algerians are found in the menial, poorly paid and disrespected positions, and are overrepresented among the unemployed.<sup>28</sup>

---

25. Those of African ancestry who emigrated to France from the Caribbean islands of Martinique and Guadeloupe in the 1960s are far more accepted and assimilated into French society than are the North African Arabs. One commentator has focused on the fact that the Caribbean émigrés are Catholic as a significant factor for the positive reception of the French when contrasted to the negativity expressed toward the Muslim Arabs. Ogden, *supra* note 15, at 109.

26. An additional reason may have been caused by the Franco-Algerian accord on military service which permits those with dual citizenship to choose the country for which they wish to serve in the military. Even though France requires only one year of service and Algeria two, a significant percentage of those of Algerian background have chosen to serve Algeria, thereby furthering the French perception that these North African Arabs have not assimilated into French Society. See BRUBAKER *supra* note 13, at 145.

27. *Id.* at 114. See also, *Migrants and Migration in France*, in 14 ETHNIC AND RACIAL STUDIES 265 (1991).

28. See BRUBAKER *supra* note 13, at 76. In the most recent years, immigration from Morocco has sharply increased at the same time that arrivals from Algeria have decreased. In the 1990 census, there were 619,000

Perhaps the greatest problem confronting the Algerian or Moroccan immigrant is the French perception of Islam. One area of French concern was the revelation that money from Saudi Arabia and Libya had been financing the construction of mosques in France.<sup>29</sup> The former Interior Minister who served in the Socialist Government of Francois Mitterand, Gaston Defferre, articulated the negatives associated with the Muslim Arabs:

When Poles, Italians, Spanish and Portuguese live in France and decide to naturalize, it matters little whether they are Catholics, Protestants, Jews, or atheists ... but the rules of Islam are not simply religious rules. They are rules of living that concern ... marriage, divorce, the care of children, the behavior of men, the behavior of women ... These rules are contrary to all the rules of French law on the custody of children in the case of divorce, and they are contrary to [French rules on] the rights of women with respect to husbands. What is more, in France we don't have the same habits of living.<sup>30</sup>

---

Algerians, 585,000 Moroccans, 207,000 Tunisians, and 178,000 West Africans. HOLLIFIELD *supra* note 18, at 151.

29. CASTLES AND MILLER, *supra* note 18, at 242.

30. BRUBAKER *supra* note 13, at 149. The Muslims were characterized as though they were a monolithic, fundamentalist people. In fact, for North African Muslims living in France, Islamic fundamentalism has little appeal. *Id.* at 149. However, the "headscarves affair" reinforced stereotypes. Muslim girls insisted on keeping their heads covered for religious purposes; the government responded by enacting legislation to prohibit the exhibition of distinctive religious symbols in schools. COLLINSON, *supra* note 11, at 24-25. The Council of State, however, declared the legislation to be in violation of the principle of freedom of expression. *Id.* at 25. The desire to wear headscarves was viewed by the French as incompatible with the key French tenet of separation of church and state.

A country accommodating those who don't have "the same habits of living" is, however, looked upon as a *positive* by those promoting a multicultural society. The Council of Europe itself officially advocated such pluralistic societies:

It has been acknowledged that immigration has ... led to the development of multi-ethnic societies and that such societies should offer possibilities for peaceful coexistence to all communities, thus enabling people to arrange their private lives in line with their own traditions ... Such relatively pluralistic views are based on the idea that, in the private sphere at least, cultures can be compatible and that different cultures and ethnic communities can live together peacefully in one and the same society.<sup>31</sup>

The association of Islam with terrorism and violence has certainly been one factor causing French suspicion of the North African Arab. The Salman Rushdie incident encouraged the perception of Islam as a violent religion. Rushdie, a Muslim resident of Great Britain, had infuriated some Muslims with his book *Satanic Verses* and was subsequently ordered to be killed by the Ayatollah Khomeini of Iran. When Iraq invaded Kuwait in 1990, France was a strong supporter of the United States in the Gulf War. But the Muslims in France were more supportive of

---

31. FINAL REPORT OF THE COMMUNITY RELATIONS PROJECT OF THE COUNCIL OF EUROPE, COMMUNITY AND ETHICS RELATIONS IN EUROPE 1 (1991). Ironically, it is perhaps the non-European countries such as Canada, Australia and the United States that most accept the concept of multiculturalism. CASTLES AND MILLER, *supra* note 18, at 13.

Iraq than was true of most Frenchmen, and tensions and hostility between the French and North Africans became heightened.<sup>32</sup>

In the 1990s, the controversy concerning the immigration of persons from the former French colonies has bordered on being an obsession. In the Parliamentary elections in May, 1997, the National Front which by then advocated forced repatriation of 3 million Third World immigrants, won its highest percentage of votes in those areas of France which had the highest concentration of North Africans.<sup>33</sup> Polls have shown that more than half of the French believe that immigrants have eroded the French way of life.<sup>34</sup> A report to the United Nations Human Rights Commission sharply attacked France for the "wave of xenophobia and racism" sweeping across the country.<sup>35</sup> Amnesty International produced a report rebuking the French police for

---

32. CASTLES AND MILLER, *supra* note 18, at 242-43. Hostility toward Muslim foreign residents has been evidenced also in the Netherlands and Belgium. *Id.* at 243-44.

33. *French Socialists Say They'll Ease Up on Immigration*, THE NEW YORK TIMES, June 12, 1997, at A13. When the Government has expelled illegal immigrants, the scene has not been pleasant: "The Government has adopted a rather brutal method ... aboard special charter flights, manned by gun-toting policemen where recalcitrant persons are gagged and strapped kicking and screaming into their seats, with heavy duty sticking tape." *The Other Face of France*, THE HINDU, March 10, 1997, at 12. In 1996, almost 15,000 immigrants were expelled in this way. *Id.*

34. *Id.*

35. *UN Human Rights Report Flags France for its Racist Immigration Laws*, INT'L HERALD TRIBUNE, April 12, 1996, at 6.

brutality against foreigners.<sup>36</sup> As long as there are those who choose to attempt to capitalize on and inflame racial antagonisms and fear of immigrants in order to achieve electoral advantage, the issue will remain politicized and divisive.<sup>37</sup>

The European country in which there is, perhaps, the greatest degree of antagonism to immigrants is Germany. Although Germany was not, of course, a post-World War II colonial power, there has been much concern expressed about the recent influx of non-Europeans to Germany. The position of the German Government on immigration could not be clearer: "The Federal Republic of Germany is not, nor shall it become, a country of immigration."<sup>38</sup> The rationale provided by the Government was that "restricting non-European Community immigration is necessary to safeguard social peace."<sup>39</sup>

---

36. *Id.*

37. One example of a nationalist attack on current French policy toward immigrants is the sharp criticism of the instruction in French schools given to the children of immigrants in "their language and culture of origin" by teachers paid for and chosen by the country of origin. See BRUBAKER *supra* note 13, at 149. The actual purpose of this policy was to enable the children in later years to feel they would be able to return to their country of origin.

38. PHILIP L. MARTIN, *Germany: Reluctant Land of Immigration* in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 165 (WAYNE CORNELIUS, PHILIP L. MARTIN AND JAMES HOLLIFIELD eds., 1994).

39. *Id.* It is interesting to note that an analysis of the role of immigrants in Germany between 1989 and 1993 concluded that there has been an overall *positive* effect on the economy. COLLINSON, *supra* note 11, at 10.

*B. Germany: Immigration, Citizenship and Naturalization of the Non-European Immigrant*

German immigration law is in sharp contrast to the *jus soli* of France.<sup>40</sup> In Germany, citizenship is attained on the basis of descent; immigrants and their children, regardless of the length of residence in Germany, remain foreigners.<sup>41</sup> The official anti-immigration position was, to be sure, echoed by the German people. A recent poll revealed that 78% of Germans believed that the pressing problem in the country was immigration.<sup>42</sup> And, since very few immigrants, even those of the second-generation, have become able to vote as citizens,<sup>43</sup> there has not

---

40. See *supra* note 13. Note, however, that anti-immigration sentiment in France has become so great that the French Ministry of interior recently stated: "France no longer wants to be a country of immigration." as quoted in *Circling the Wagons*, THE ECONOMIST, June 5, 1993, at 48. After two months of Minister Charles Pasqua talking about 'zero-immigration', his popularity rating in France jumped 25 points. *Zero option: France*, THE ECONOMIST, June 12, 1993, at 57.

41. See BRUBAKER *supra* note 13, at 81. Being born in Germany, even if one has subsequently lived all one's life there, has not any relevance to the acquisition of citizenship.

42. As reported in THE GUARDIAN, Sept. 1, 1992.

43. See BRUBAKER *supra* note 13, at 145.



been any immigrant voting bloc able to demand the attention of politicians.<sup>44</sup>

The parallel to the North African Arab in France is the Turk in Germany. Approximately 25% of all Germany's foreigners are from Turkey, and the Turks, above all, have failed to integrate into German society.<sup>45</sup> It is the Turks who are most commonly the victims of wanton violence by German youths, and in 1992-1993, police reported that such attacks had numbered between 50 to 100 per day.<sup>46</sup>

---

44. In fact, for many aliens, the focus of their political concerns is the politics back in the country of their origin. This is the situation, probably, because of a combination of factors: the rejection that these disenfranchised individuals feel from their new home country, as well as their continued cultural affinity for their homeland. Both Sweden and the Netherlands, unlike Germany, permit aliens to vote in regional and local elections. CASTLES AND MILLER, *supra* note 18, at 235.

45. MARTIN, *supra* note 38, at 206-07. Turks remain the poorest of the foreigners due to their low level of education and skills. The fact that they are Islamic has meant to many Germans that the Turks are simply unable and unwilling to integrate into German culture. *Id.* at 207. During the 'economic miracle' years in the late 1950s-60s, Italians dominated the foreign workforce and comprised almost half of the aliens. Hartmut Esser and Hermann Korte, *Federal Republic of Germany* in EUROPEAN IMMIGRATION POLICY 170 (Tomas Hammar ed., 1985).

46. *Id.* at 189. Many of these attacks have been instigated by skinheads who have received at least tacit encouragement by some of the rightist, anti-immigrant political parties. *Id.* The violence has begun to occur in both directions. In areas where there are large Turkish populations, young, nationalistic, Turkish street gangs, angry at their treatment by the Germans, have formed. *Germany Rethinks Its Tough Citizenship Law*, THE IRISH TIMES, April 24, 1997, at 11.

The law in Germany that bases nationality on blood lines has created an unusual situation indeed. Millions of ethnic Germans who have been living for generations in the Kazakstan and Volga regions of the former Soviet Union have, since the breakup of the Soviet Union, emigrated to Germany.<sup>47</sup> The Aussiedler (out-settlers) do not speak German and are unfamiliar with the ways of the country, but are automatically entitled to citizenship upon their arrival.<sup>48</sup> But a Turk who was born in Germany, who can speak German fluently and may work for a German company and had paid taxes to Germany for years, confronts huge obstacles to achieving citizenship.

## II. THE INTRODUCTION OF LEGISLATION TO RESTRICT IMMIGRATION TO GREAT BRITAIN

### A. *The Treatment of the Chinese*

The residents of Hong Kong, as was the case with all who resided in any part of the British Empire, had historically been able to enter Great Britain without any restrictions. Indeed, it was considered a cornerstone of the institution of the British Empire that “every subject of the King who ever he may be or

---

47. William Drozdiak, *Germany Begins to Accept Changing Ethnic Makeup: Naturalization Process May Be Eased*, WASHINGTON POST, April 28, 1997, at A01. For many of these ethnic Germans, their roots in the Soviet Union date back to the 18th Century. *Non-Germans in Germany*, ASIAN WALL STREET JOURNAL, May 1, 1997, at 10.

48. *Blood Disorder: Germany*, THE ECONOMIST, March 23, 1996, at 48. There may still be almost two million Aussiedler residing in the former Soviet Union.

where he may live has a natural right to travel or still more to settle in any part of the Empire."<sup>49</sup> Under the 1948 British Nationality Act<sup>50</sup>, a national of any state in the Commonwealth was deemed a 'British subject'<sup>51</sup> and a 'Citizen of the United Kingdom and Colonies.'

It was the Commonwealth Immigrants Act of 1962<sup>52</sup> which first imposed restrictions on the freedom of British subjects to emigrate to the United Kingdom. That Act created two categories of Hong Kong residents: those who were born in Hong Kong and those who had lived there for at least seven years and had been issued a United Kingdom passport to emigrate to Great Britain continued to be able to emigrate to Great Britain; the other residents could not.<sup>53</sup> Parliament engaged in extensive

---

49. See William H. Liu, *The Legal Person of Hong Kong Chinese in British Law*, Asian Profile, Vol. 4, No. 3, 195, 198 (June 1976).

50. British Nationality Act of 1948. The Act declared that upon annexation of territory by the Empire the residents therein became Commonwealth citizens. The Act specifically deemed the residents of Hong Kong to be citizens of the United Kingdom and Colonies. *Id.*

51. In 1980, however, the Government declared that the term "British subject" was 'out of date' and substituted "Commonwealth citizen." OUTLINE OF PROPOSED LEGISLATION: BRITISH NATIONALITY ACT, HMSO at 32, ¶ 106 (1980).

52. Commonwealth Immigrants Act, 1962, ch. 21. See also, Commonwealth Immigrants Act, 1968, ch. 9.

53. *Id.* at §§(2)(3). One Parliamentarian opposed the Act, claiming that it was widely accepted that the restrictions on immigration were motivated by

debate on this controversial legislation. The Government was forced to make a number of concessions, one of which was that annual review and renewal of the Act by Parliament was required.<sup>54</sup>

It was, however, the British Nationality Act of 1981 which clearly discriminated against the Hong Kong Chinese.<sup>55</sup> When Parliament began debating the Act it was assumed that there would be equal treatment for all of the remaining dependent territories.<sup>56</sup> However, as the debate continued, it became clear

---

“colour prejudice and racial discrimination.” Remarks of Raymond Fletcher, 654 PARL. DEB., H.C. (5th ser.) 1198 (1962).

54. Zig Layton-Henry, *Great Britain*, in *EUROPEAN IMMIGRATION POLICY* 125 (Tomas Hammar ed., 1985).

55. Other British immigration legislation was targeted at other racial groups. For example, The Commonwealth Immigrants Act of 1968 was found by the European Commission on Human Rights to have been specifically designed to keep East African Asians out of Great Britain. See *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. 76, 83 (1973). The Commission determined that the East African Asians, by being denied the right to live in the UK, were being treated as second class citizens and were being subjected to “degrading treatment” in violation of Article 3 of the European Convention. *Id.* at 85-86.

56. The remaining British Dependent Territories (previously referred to as “Colonies”) were: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, St. Christopher-Nevis, St. Helena, South Georgia, South Sandwich Islands, Turks and Caicos Islands. The population of Hong Kong represents over 95% of all the people living in these territories. STEPHEN DAVIES & ELFRED ROBERTS, *POLITICAL DICTIONARY FOR HONG KONG* 69 (1990). The fact that 95% of those who would be affected by the legislation were Hong Kong Chinese did not prevent Parliamentarians from making comments such as that made by the Minister of State, Home Office: “I stress that the proposals are in no way directed

that the Hong Kong Chinese presented, as one member of the House of Lords put it, "the immigration problem in this country."<sup>57</sup> By the time the Act became effective on January 1, 1983, it was primarily the Hong Kong Chinese who were to be left standing without the 'right of abode' (to emigrate)<sup>58</sup> to Great Britain. Their passport would no longer read "British citizen, subject of the United Kingdom and colonies."

In the Government's White Paper outlining the proposed changes in immigration policy<sup>59</sup>, the rationale for the changes were (not so directly) stated: "Ideas of citizenship which were suitable in 1948 are no longer so, and our citizenship laws are out of date. Arrangements have now to be devised which will be suitable for the changed circumstances and will endure for a very long time ahead."<sup>60</sup> The White Paper explained that:

---

particularly at Hong Kong." Comments of Timothy Raison in the House of Commons debate on the British Nationality Bill, Jan. 28, 1981.

57. Statement by Lord Carver in the House of Lords Debate on the British Nationality Act of 1981, July 22, 1981.

58. The right of abode was defined in *Director of Pub. Prosecutions v. Bhagwan*, App. Cas. 60, 74 (1970) as the right to "enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he liked." To the people of Hong Kong, it meant the right to live as a full citizen.

59. OUTLINE OF PROPOSED LEGISLATION: BRITISH NATIONALITY ACT (1980).

60. *Id.* at 1, ¶ 4.

a new scheme of citizenship should reflect the strength of the connection that various groups of people have with the United Kingdom in the world today ... a more meaningful citizenship [should exist] for those who have close links with the United Kingdom (and who could be expected to identify themselves with British society).<sup>61</sup>

The people of Hong Kong, although 'ruled' by Britain for almost 140 years at the time, were not deemed to be among those with 'close' enough links. The Home Office Minister of State put it this way: "We have finally got to dispose of the lingering notion that Britain is somehow home for *all* whose countries we once ruled."<sup>62</sup>

The Chinese in Hong Kong were the recipients of a token gesture by the British Parliament: whereas on the passports created by the Act, it was to have read "British Dependent Territories Citizenship" under "Nationality", it was changed to merely read "British".<sup>63</sup> But within six months of the effective date of the Act, in order to ensure that Hong Kong residents would not be able to make any legal claims on Britain, all new passports were to be stamped "[H]older subject to control under the Immigration Act."<sup>64</sup> To further complicate matters, this

---

61. *Id.* at 3, ¶ 11.

62. *UK Not Home to Old Colonies*, SOUTH CHINA MORNING POST, Oct. 10, 1980 (emphasis added).

63. See Michael Chigani, *New Blow to Hong Kong Passports*, SOUTH CHINA MORNING POST, JUNE 30, 1983.

64. *Id.*

stamp was soon to be eliminated and a new endorsement was added: "Holder has the right of abode in Hong Kong."<sup>65</sup>

*B. Enactment of Legislation to Favor Immigrants from Gibraltar and the Falkland Islands*

The white citizens of European-ancestry in the dependent-territory of Gibraltar were, indeed, as the Act worked its way through Parliament, given the right to reside in Britain.<sup>66</sup> It was, perhaps, easy for the members of Parliament to distinguish Gibraltar in that it was part of Europe.<sup>67</sup> But to distinguish the Falkland Islands, geographically located in South America and a British colony for approximately the same length of time as Hong

---

65. *Id.*

66. One result of the residents of Gibraltar being considered British was that students from Gibraltar attending university in Britain did not have to pay the much higher fees charged to Hong Kong students. Statement of David Steel in the House of Commons Debate on the British Nationality Bill, June 2, 1981. The high fees charged to the "foreign" Hong Kong students were thought by one Parliamentarian to be a factor in the deep resentment felt by the Hong Kong residents toward Britain. *Id.*

67. Some attempts to distinguish Gibraltar from Hong Kong, however, bordered on the absurd. For example, Lord Hughes in the June 22, 1981 debate in the House of Lords on the British Nationality Bill, claimed that it was the nearly 300 years of ties between Gibraltar and Britain as contrasted to the mere 140 years for Hong Kong's British colonial status that earned the residents of Gibraltar the right to emigrate to Britain. The fact that Spain had been claiming Gibraltar as a part of Spain since 1713 was considered to be of no import.

Kong, from Hong Kong was more difficult. The fact that the Falkland Islanders were white was, of course, never to be specifically articulated in the Parliamentary debate, yet it was clear that race was a crucial factor.

Lord Aylestone, who introduced the Amendment in the House of Lords to permit Falkland Islanders to emigrate to Britain, stated to the House that the people there were “probably more British than we are.”<sup>68</sup> It is difficult to imagine the Hong Kong Chinese being similarly described.<sup>69</sup> In fact, one member of Parliament (and former Home Office Minister) made it clear that at least to him, “British” and “Hong Kong Chinese” didn’t go together: “There is no sense in which the people of Hong Kong, whatever we call them, *are British in any other way* than that they are linked to Britain in a colonial status.”<sup>70</sup> Another member of the House similarly highlighted the import of race, although the connection between his comment and his support for the Amendment was not made terribly clear: “I shall like to

---

68. Statement of Lord Aylestone in the House of Lords Debate on the British Nationality Bill of 1981, July 28, 1981. Lord Aylestone continued that granting the right of abode to the Falkland Islanders “will help to reassure those British people, who are so many miles away, that we have not forgotten them and they will be able to regard themselves, as they want to regard themselves, as first-class British citizens.” *Id.*

69. Throughout the Parliamentary debate, comments of affinity for the Falkland Islanders were made in attempts to justify why they and not the Hong Kong Chinese should receive the right to abode. *See, e.g.*, Statement of Lord Trefgarne referring to the “*very deep affection* which we all have for the people of the Falkland Islands.” House of Lords Debate on the British Nationality Bill of 1981, July 28, 1981.

70. Michael Jones, *Labour Criticizes Nationality Bill Propaganda*, SOUTH CHINA MORNING POST, April 16, 1981, reporting the comment of Alex Lyon (emphasis added).



finish [the statement in support of the Falklands] by drawing your Lordships' attention to what Lenin said: 'The only resistance to world domination by Communism will come from the Anglo-Saxon race' ... I would just add a further plea to the Government to accept this Amendment."<sup>71</sup>

Both the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>72</sup> and the *Convention on the Reduction of Statelessness*<sup>73</sup> prohibit the deprivation of nationality on racial or ethnic grounds. The British Nationality (Falkland Islands) Amendment Bill was passed, nevertheless, giving full British citizenship to the residents of the Falkland Islands.<sup>74</sup> The *Guardian* weekly of London responded to the legislation by characterizing it as an "anti-immigration measure based on racial discrimination."<sup>75</sup> Indeed, many in Parliament saw it that way

---

71. Statement of Viscount Massereene in the House of Lords debate on the British Nationality Bill of 1981, July 28, 1981.

72. International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for Signature and Ratification by General Assembly Resolution Article 5(d)(iii), 2106 A (XX) of 21 December, 1965.

73. Convention on the Reduction of Statelessness, Article 9 (1961). Britain is a contracting party to the Convention. The International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, does not, however, provide for the right to a nationality.

74. H.L. Bill No. 4 (1982-83). It is only with the attainment of full citizenship that one is entitled to the right of abode. British Nationality Act (1981) s.39.

too; one member of the House of Lords asked directly whether the main way in which Hong Kong was really being distinguished was that the residents there had "yellow faces."<sup>76</sup>

### *C. The Response in Hong Kong*

The out-of-power Labour Party was somewhat more responsive to the wishes of the Hong Kong Chinese than were the Conservatives. In a House of Commons debate nine months after the effective date of the Nationality Act, it was stated that "The Labour Party remains firmly committed to the repeal of the British Nationality Act ... We look forward to the earliest opportunity for a Labour Government to repeal [this] piece of repugnant legislation."<sup>77</sup> But the Conservative Chairman of the House of Commons Subcommittee on Race Relations subsequently dismissed any possibility of repeal: "There is no conceivable way in which Parliament could change the

---

75. Editorial of Dec. 5, 1982, reported in Brendon Gullifer, *Nationality Act Based on Race*, SOUTH CHINA MORNING POST, Feb. 16, 1983.

76. Statement by Viscount Eccles in the House of Lords Debate on the British Nationality Act of 1981, July 22, 1981. The Viscount added that "If that is the reason it is a very bad reason." *Id.* One could certainly read racist attitudes into comments of those Parliamentarians desiring to allow residents of Gibraltar, but not the Chinese of Hong Kong, to emigrate. For example, the Lord Chancellor told the House of Lords that the pro-Gibraltar policy is "motivated by a sincere feeling of friendship and loyalty for the people of Gibraltar ... We would all of us, I think, express undying attachment to our friends [in Gibraltar]." House of Lords Debate on the British Nationality Act of 1981.

77. HONG KONG GOVERNMENT INFORMATION SERVICES DAILY REPORT, Nov. 30, 1983, extract of House of Commons Debate of Nov. 21, 1983.

immigration or nationality laws -- We might as well say 'let's start walking to the moon'. This is a total red herring and the sooner it's forgotten about the better."<sup>78</sup>

The reaction in Hong Kong to the Act was decidedly negative.<sup>79</sup> The Hong Kong citizens felt that in some way they had lost their nationality in violation of Article 15 of the Universal Declaration of Human Rights: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."<sup>80</sup> There was particular anger in Hong Kong that a provision of the British Nationality Act required that even though all was being offered was the very watered down passport, the following Oath of Allegiance was required to obtain that passport: "I swear by Almighty God that ... I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second Her Heirs and Successors according to law."<sup>81</sup> Hong Kong was perceived as gaining little from the British-connection anymore, and the relationship with London was seen as increasingly one-sided. A particular sore point was that very close in time to the passage of the Act, the huge Hong Kong

---

78. *U.K. door shut against HK exodus: MP*, HONG KONG STANDARD, June 16, 1984.

79. *See, e.g., Chris Word, Leaders 'Let us Down' on Bill*, SOUTH CHINA MORNING POST, Mar. 3, 1983.

80. Universal Declaration of Human Rights, Article 15(2), Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December, 1948.

81. British Nationality Act, 1981 ch. 61 §41(1), sched. 5 (Eng.).

utility, the China Power and Light Company, gave a much needed contract worth over 550 million British pounds to a British consortium of companies.<sup>82</sup> Britain at the time was suffering from the effects of a world wide recession, and the Hong Kong contract was the largest export order in history.<sup>83</sup>

Even the pleas from the Hong Kong Government that "there is fundamental, deep-seated and emotional opposition to the Bill among Hong Kong people"<sup>84</sup> had been ignored. The despair could also be noted from an editorial in the typically pro-British South China Morning Post, warning against what was to be the inevitable: "If it transpires that in spite of all its lobbying and representations Hong Kong has achieved little or nothing, London would do well to ponder the disillusionment this will cause. And not a few are going to ask whether the British Government can be trusted anymore."<sup>85</sup> Criticism was tempered, however, for the time being, since Britain had not yet entered into the agreement with the People's Republic of China which was to provide for the handing over of Hong Kong in 1997.

---

82. Statement of the Prime Minister to the House of Commons, Mar 31, 1981. The Prime Minister added that the contract for the Castle Peak B Station would create 5,000 to 7,000 new jobs for Britain. *Id.*

83. Statement of Sir Paul Bryan to the House of Commons, Mar. 31, 1981.

84. As cited by Lord Mishon in the House of Lords Debate on the British Nationality Bill on June 22, 1981.

85. As cited by Lord Gettes in the House of Lords Debate on the British Nationality on June 22, 1981.

### III. THE YEARS AFTER THE BRITISH-CHINA ACCORD

The JOINT DECLARATION BETWEEN THE UNITED KINGDOM AND THE PEOPLE'S REPUBLIC OF CHINA<sup>86</sup> was signed in a formal ceremony in Beijing on December 19, 1984.<sup>87</sup> The Declaration provided for all of the British Dependent Territory of Hong Kong -- The New Territories (the lease for which was due to expire in 1997), as well as Hong Kong Island and Kowloon (which Britain was under no treaty obligation to give to China) -- to become part of the People's Republic of China in 1997.<sup>88</sup> The British used

---

86. The complete title of the document is A DRAFT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLES' REPUBLIC OF CHINA ON THE FUTURE OF HONG KONG. There are four documents that comprise the Draft Agreement: (1) The Joint Declaration; (2) Annex I: Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong; (3) Annex II: Sino-British Joint Liaison Group; (4) Annex III: Land Leases. In addition, there are two accompanying memoranda: (A) United Kingdom Memorandum; (B) Chinese Memorandum.

87. The signatories were Prime Minister Margaret Thatcher for Britain and Prime Minister Zhao Ziyang for China. The Declaration is an internationally recognized agreement, on file with the United Nations.

88. The Joint Declaration contains the following statements: "The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China", and "[t]he Government of the People's Republic of China has decided to *resume* the exercise of sovereignty over Hong Kong"(emphasis added). The PRC, although accepting the date for *resumption* of sovereignty as the same date that the treaty regarding the New Territories expires, refused to officially acknowledge the legitimacy of the two earlier treaties concerning Hong Kong Island and Kowloon.

the issuance of the JOINT DECLARATION to reiterate and reemphasize to the Chinese in Hong Kong that they would not be able to emigrate to Britain even after Hong Kong becomes part of China. The official *United Kingdom Memoranda*, published along with the JOINT DECLARATION, stated:

All persons who on 30 June 1997 are, by virtue of a connection with Hong Kong, British Dependent Territories Citizens (BDTCs) under the law in the United Kingdom will cease to be BDTCs with effect from 1 July 1997, but will be eligible to retain an appropriate status which, *without conferring the right to abode in United Kingdom*, will entitle them to continue to use passports issued by the Government of the United Kingdom.<sup>89</sup>

The transference of this land with almost 6 million inhabitants, without any consultation of those who were living there, was viewed most critically in Hong Kong at the time of the Tiananmen Square protests in 1989.

#### *A. Repercussions of Tiananmen Square*

Within two days of the declaration of martial law in the People's Republic of China and the concurrent action of troops against the student protesters in Tiananmen Square, over 600,000 people marched in protest in Hong Kong.<sup>90</sup> The Chinese in

---

89. MEMORANDA TO THE DRAFT AGREEMENT, *supra* note 86, at ¶ a (emphasis added).

90. *Huge Hong Kong Rally Backs Students*, SOUTH CHINA MORNING POST, May 22, 1989 .

Hong Kong seemed united in their call for the resignation of Chinese Premier Li Peng, inspired perhaps by their fear of similar actions being taken in Hong Kong after 1997.<sup>91</sup> Within days, over \$2 million (Hong Kong) was raised as donations for the pro-democracy activists in China<sup>92</sup> and the Governor of Hong Kong, Sir David Wilson, supported the Hong Kong protests.<sup>93</sup> British support of *any* actions taken by the Hong Kong Chinese in the political sphere was highly unusual; more commonly, demonstrations were suppressed and protesters arrested.<sup>94</sup> The

---

91. Even the pro-China Hong Kong daily, WEN WEI PO, financed by the Peoples Republic of China, protested against the crackdown, calling the Chinese leaders "thieves" who had turned against the Chinese people. *Daily's Leader Voices Short, Bitter Protest*, SOUTH CHINA MORNING POST, May 22, 1989, at 4.

92. *Confusion Over Surplus of Donations*, SOUTH CHINA MORNING POST, May 24, 1989, at 3. The exchange rate at the time was approximately 7.8 Hong Kong dollars for one United States dollar.

93. *Governor in Support of Hong Kong Marches*, SOUTH CHINA MORNING POST, May 25, 1989, at 1.

94. For a thorough analysis of this aspect of British rule, see Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 701(1997).

next week, 600,000 again demonstrated<sup>95</sup> and \$26 million had been raised.<sup>96</sup>

Confidence in the future stability of Hong Kong plummeted;<sup>97</sup> the stock market fell 22% in one day.<sup>98</sup> China hit back at the Hong Kong support for the pro-democracy activists, and targeted the media<sup>99</sup> and political leaders.<sup>100</sup> The Chinese took steps to

---

95. *Another Vast Crowd Joins Worldwide Show of Solidarity*, SOUTH CHINA MORNING POST May 29, 1989, at 1.

96. *See \$26 Million in Dilemma*, SOUTH CHINA MORNING POST, May 30, 1989, at 1.

97. *See Confidence Plummets After Martial Law*, SOUTH CHINA MORNING POST, June 14, 1989, at 7.

98. *See Index Dives 22% in Panic Sell-Off*, SOUTH CHINA MORNING POST, June 6, 1989, at 1. This led to business' concern about the new political activity in Hong Kong and a full page advertisement was taken out in the major Hong Kong English language daily maintaining that, "[a]ll Hong Kong people should join forces with the Hong Kong Government to maintain the stability and prosperity of Hong Kong and should never be involved in any activity which would damage social order and the Hong Kong economy." SOUTH CHINA MORNING POST, June 27, 1989, at 21.

99. *See, e.g., Count-Down To The Clamp-Down*, INDEX ON CENSORSHIP, Jan. 1991, at 20; *Mayor Puts Blame on Hong Kong Publications*, SOUTH CHINA MORNING POST, July 7, 1989 (the Mayor of Beijing, in a speech to the National People's Congress, accused the Hong Kong media of aiding those who desired to overthrow Deng Xiaoping).



prohibit such criticism against the government of China after 1997. The Chinese had been drafting the BASIC LAW -- a "constitution" to govern the HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR)<sup>101</sup> after 1997 -- for a number of years prior to the Tiananmen demonstrations.<sup>102</sup> After the Hong Kong people demonstrated in opposition to the People's Republic of China, the draft of the BASIC LAW was amended to *require* the HKSAR to enact laws to prohibit "subversion against the Central People's Government" and to bar "Hong Kong political organizations from establishing links with overseas political groups."<sup>103</sup>

The desperation of the Hong Kong Chinese was perhaps at its height when a proposal was made by the Adam Smith Institute to rebuild Hong Kong on the Scottish coast so that the people wouldn't be subject to Chinese rule after 1997.<sup>104</sup> The Hong

---

100. Those who supported the protesting pro-democracy students in Beijing were labeled "subversives." See S.Y. Wai, *Hong Kong Under Fire from Beijing Leaders*, SOUTH CHINA MORNING POST, June 16, 1989, at 4.

101. See *supra* note 10

102. THE BASIC LAW OF HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLES REPUBLIC OF CHINA (Hong Kong Government Printer 1990). The preliminary draft of the BASIC LAW was first made available in mid 1987.

103. *Id.*

104. *Build New Hong Kong on Scottish Coast, Says Think Tank*, SOUTH CHINA MORNING POST, June 20, 1989, at 1. The proposal called for an enterprise zone, a new town, and a free port.

Kong Bar Association, in a letter to Prime Minister Thatcher, warned that unless the nationality issue was resolved and there were to be full democratization of Hong Kong by 1997, the colony "will go into a steep decline" and "in due course, panic will set in. Hong Kong will become difficult to govern, if not ungovernable."<sup>105</sup>

To the Chinese in Hong Kong, many of whom had fled there to escape the Communist government in China, the brutal power used by the PRC Government made them feel, more than ever, the need for an 'escape valve' -- someplace to run to if the PRC rule of Hong Kong were found to be intolerable. The Foreign Affairs Committee of the House of Commons had that very spring of 1989 visited Hong Kong on a routine review of the status of the territory<sup>106</sup> The citizens of Hong Kong focused on trying to get that Committee's report to recommend permission for the Hong Kong Chinese to emigrate to Britain.

Over 700,000 signatures in Hong Kong were collected demanding that Britain provide the right of abode to the Chinese in Hong Kong.<sup>107</sup> Two of the senior members of the Government's Executive Council and Legislative Council went to London to plead the case for the Hong Kong Chinese. The two members encountered misconception, misunderstanding and fear relating to Hong Kong among the English because, the Council

---

105. Jennifer Cooke, *Bar Warns United Kingdom of 'Ungovernable' Hong Kong*, SOUTH CHINA MORNING POST, June 25, 1989, at 5.

106. Even though this visit occurred before the Tiananmen riots, the leader of the delegation, David Howell, acknowledged that his group had encountered "enormous bitterness" towards Britain. *Parliamentary Inquiry*, THIS WEEK IN HONG KONG, Apr. 17-23, 1989, at 1.

107. *Nationality*, THIS WEEK IN HONG KONG, June 19-25, 1989, at 3.

members concluded, "the British Government always scares them with the figure of 3.25 million people seeking residence in Hong Kong."<sup>108</sup>

Support for the Hong Kong Chinese did come from several sources. *The Times* of London in an editorial warned that British honor was at stake and called for a restoration of the rights of the Chinese to settle in Britain.<sup>109</sup> *The New York Times* called it an

---

108. *Id.* (quoting Dame Lydia Dunn, a senior advisor to the Government in Hong Kong for many years, and one who has been rarely known to criticize the British). The 3.25 million figure refers to the number of Hong Kong residents holding British Dependent Territories Citizenship passports, having lived in Hong Kong for more than 7 years or having been born there. As of January 1, 1983, the only additional people able to acquire British Dependent Territories Citizenship were those born to such citizens. The British Dependent Territory Citizen (BDTC) passport had no validity after 1997, and what type of passport these former British subjects would be issued was the focus of an accompanying memorandum to the Joint Declaration (which provided for China's assumption of sovereignty over Hong Kong on July 1, 1997). The BDTC passport was replaced by a British National (Overseas) passport which will not be transferable to the holder's children. The only value of this passport is, according to the British memorandum which accompanied the Joint Declaration, that the holder "will be entitled to receive, upon request, British consular services and protection when in third countries." See also, Hong Kong Act, ch. 15, (1985), the British legislation providing for the end of British sovereignty in 1997, which detailed the issuance and usefulness of the British National (Overseas) Passport. The insignificance to the Chinese of this new passport was underscored in their accompanying Memorandum to the Joint Declaration: "Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories citizens' Passport or not, are Chinese nationals."

109. *The Hong Kong Crisis: Duty and Honour*, THE TIMES (London), June 9, 1989. Support came from across the political spectrum. The SPECTATOR, the leading conservative weekly, called on Britain not only to grant the right of abode, but to renounce the Joint Declaration's commitment to give Hong Kong to China in 1997. See *Britain Must Not Condemn Hong Kong People to*

offense to decency and honor for Britain to "justify delivering 3.5 million British subjects like so many sacks of potatoes to a communist tyranny", adding that the British Government's position was "spineless, even shameful."<sup>110</sup> Indeed, one of the reasons given back in 1981 for passing the Amendment to the British Nationality Bill of 1981 granting Falkland Islanders the right of abode<sup>111</sup> was that the alternative for the residents there

---

*Slavery*, SPECTATOR, reprinted in SOUTH CHINA MORNING POST, June 8, 1989, at 15.

110. *Hong Kong Deserves a British Roar*, N.Y. TIMES, June 9, 1989, at A1, 30. At the time of the original decision and vote in Parliament for the Nationality Act of 1981, it was not known that Britain and China would be agreeing that China would assume sovereignty over Hong Kong in 1997. Had it had been known that these British subjects were to be ruled by Communists, the vote in Parliament to deny the right of abode to the Hong Kong Chinese -- so very close as it was -- may have come out differently. It has long been rumored in Hong Kong that on the very first official visit of any Hong Kong Governor to Beijing, Governor MacLehose in 1979 was told by Deng Xiaoping that China was intent on obtaining control over all of Hong Kong in 1997. See Shane Green, *Following the MacLehose Trail*, SOUTH CHINA MORNING POST, May 12, 1989, at 23. Finally, in 1994, the Director of the Hong Kong and Macau Affairs Office of the PRC revealed that Deng had indeed told MacLehose that "Hong Kong is going to be *handled by us* as a special region" by 1997. Address by Lu Ping in Hong Kong on May 6, 1994, reprinted in *Deng Ensured Special Status for Hong Kong*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, May 14-15, 1994, at 2 (emphasis added). The official British position had repeatedly been that there had been no discussion regarding the future of Hong Kong at the Deng-MacLehose meeting. See e.g., Written Answer of the Minister of State for the Foreign and Commonwealth Office, Peter Blaker, in the House of Commons Debate on the issue of British Nationality. Oct. 29, 1980. The secrecy of MacLehose, who was Governor from 1971-1982, on such a crucial matter, has been the subject of much criticism. See, e.g., Brian Tisdall, *Less than frank affair*, SOUTH CHINA MORNING POST, Dec. 28, 1984.

111. See *supra* note 68.

was likely to be control by the repressive Argentinean government. For example, in language that could well apply to the situation confronting the Chinese in Hong Kong, post-Tiananmen, Lord Avebury had stated:

I think it is our duty to make sure that the people who live in those islands are given the support of British citizenship so that they will know that it is not the intention of Her Majesty's Government to hand them over against their will to a particularly repugnant military regime which massacres many of its own citizens.<sup>112</sup>

And, perhaps, in what should have been a crucial and determinative factor, the British Governor of Hong Kong traveled to London to urge that British policy change and grant the Hong Kong Chinese the right of abode.<sup>113</sup> Prior to the release of the Foreign Affairs Committee's Report, there were accounts that even Prime Minister Thatcher's position had begun to change. The Prime Minister told Parliament: "We will be looking at this

---

112. Statement of Lord Avebury in the House of Lords Debate on the British Nationality Bill of 1981, July 22, 1981.

113. *Governor Urges Right of Abode*, SOUTH CHINA MORNING POST, June 8, 1989, at 1. Governor Wilson argued that the change was necessary if the British were to have the respect of the Hong Kong people. The Governor's position is, of course, that of a British civil servant and is bound to follow the policies emanating from London. Directives are issued by the Secretary of State and the Governor will remain in office only as long as the Prime Minister and Secretary of State desire him to do so. The role of the Governors of British colonies was set out in the COLONIAL REGULATIONS section entitled: "Directions to Governors for general guidance given by the Crown through the Secretary of State for the Colonies." COLONIAL OFFICE, COLONIAL REGULATIONS, BEING REGULATIONS FOR HIS MAJESTY'S COLONIAL SERVICE (London, HMSO, 1934).

in the next few days and will come to the House if we need extra powers.”<sup>114</sup> And in the House of Commons itself, there were reports of “angry scenes” and “tensions over the future of the territory boiled over.”<sup>115</sup>

*B. The Impact of the Report of the Foreign Affairs Committee*

The Report’s findings, however, were unequivocal and not what the Hong Kong Chinese were hoping for. The Report warned that were the right to abode to be granted, “Britain could be vulnerable to *influxes of people* which may be provoked by internal events in China itself rather than the situation in Hong Kong.”<sup>116</sup> Once again, that vision of hoards of yellow faces coming to the British Isles was invoked.<sup>117</sup> The Secretary of

---

114. David Wallen, *Thatcher Gives Hint on Nationality*, SOUTH CHINA MORNING POST June 9, 1989, at 1.

115. SOUTH CHINA MORNING POST, June 14, 1989. The British gradually began referring to Hong Kong not as a “colony” but as a “territory” in the 1970s so as perhaps to diminish the British role as a colonizing, imperial ruler. The first formalized use of “Territory,” was in the OUTLINE OF PROPOSED LEGISLATION: THE BRITISH NATIONALITY ACT HMSO (1980), at 3-4, ¶¶ 14-15 where the proposed status of residents of the “British Dependent Territories” was spelled out. By March of 1982, the Colonial Office had ceased to exist and the affairs of the “Territories” were handled by the Foreign and Commonwealth Office.

116. *Full Text of the Foreign Affairs Committee Report*, Special Edition, SOUTH CHINA MORNING POST, July 1, 1989, at 1(emphasis added).

State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, supported the Report, adding that the conclusion was not a racist one, "nothing of the sort. It is a practical problem ... The plain fact is that there is simply no way that a British Government could grant to several million people the right to come and live in Britain."<sup>118</sup>

The reaction of the British-appointed government officials in Hong Kong was startling. For the first time in the history of British rule of this colony, the British-nationals in Hong Kong spoke out against their mother country. The Chief Secretary, (second in importance to the Governor),<sup>119</sup> Sir David Ford, told

---

117. Indeed, by then the fear had become widespread. A British newspaper poll of 1,000 found that 65% were against giving Hong Kong people the right of abode, and only 25% were in favor. *SOUTH CHINA MORNING POST*, July 5, 1989, at 1. This is in contrast to a 1983 survey which found that 40% of Britons believed the Hong Kong residents should be permitted to emigrate. Fiona McMullin, *Nationality: the constant battle for acceptability*, *HONG KONG STANDARD*, Sept. 27, 1984. To be sure, antagonism against immigrants in general was used to bring up fear of any wave of Hong Kong Chinese coming to England. For example, a columnist in *THE TIMES* of London who opposed the right to abode for the people of Hong Kong, portrayed the situation in England in 1990 as one that could hardly have been imagined years before: "An essentially alien enclave with little point of contact with the native culture would be statistically dominant in large urban areas. . . many schools where the British cultural and linguistic elements were in a minority; that sometimes this would create educational disadvantage for those whose home language was English; that teachers who drew attention to this would be sacked, as were some who were accused of 'colonialism' because they taught English instead of 'multi-culturalism.'" Ronald Butt, *Keep Cool on Hong Kong*, *THE TIMES* (London), January 8, 1990, at 12.

118. *HONG KONG GOVERNMENT DAILY INFORMATION BULLETIN*, July 3, 1989, at 1.

119. Prior to 1976, the position of Chief Secretary was referred to as Colonial Secretary. The Secretary is the official head of the Civil Service and

the Hong Kong Legislative Council days after the issuance of the Report that the British arguments against the granting of the rights of abode were “fundamentally flawed.”<sup>120</sup> The Senior Legislative Councilor termed the Report “unacceptable”, and another Councilor and long-time friend of the British-rule stated that the British just didn’t comprehend the fear of a “Tiananmen scenario in Hong Kong.”<sup>121</sup> The Legislative Council voted unanimously to condemn the Foreign Affairs Committee Report.<sup>122</sup> One political party in Hong Kong called for the boycott of all British goods.<sup>123</sup>

The members of the Executive Council in Hong Kong (all of whom are appointed by the Governor to advise the Governor on policy matters)<sup>124</sup> and the members of the Legislative Council<sup>125</sup>

---

the principal advisor to the Governor. The Secretary oversees the Secretariat which has the responsibility of formulating and carrying out the policies of the Government.

120. HONG KONG GOVERNMENT DAILY INFORMATION BULLETIN, July 5, 1989, at 1.

121. *Id.* at 8. (comments of Allen Lee and Selina Chow). A former Chair of the Hong Kong Bar Association claimed that Hong Kong had a strong basis to sue London for depriving the residents of the right to abode. See *Nationality, THIS WEEK IN HONG KONG*, June 26-July 2, 1989, at 2.

122. *FAC Report, THIS WEEK IN HONG KONG*, July 3-9, 1989, at 1.

123. *Right of Abode, THIS WEEK IN HONG KONG*, July 10-16, 1989, at 1.

124. The Executive Council considers only those issues which the Governor has determined are to be discussed. The Governor need not heed the advice of



were united in Hong Kong until 1992 in a body called OMELCO (Office of the Members of the Executive and Legislative

---

the Council, as long as he reports his disagreement to London. ROYAL INSTRUCTIONS, PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET TO THE GOVERNOR AND COMMANDER-IN CHIEF OF THE COLONY OF HONG KONG AND ITS DEPENDENCIES, dated February 14, 1917. If a member of the Council believes the Governor to be acting improperly, the only recourse for the member is to contact the Secretary of State for Foreign and Commonwealth Affairs in London. It was not until 1920 that a Chinese was first appointed to the Council. NORMAN MINERS, HONG KONG UNDER IMPERIAL RULE, 1912-1941 54 (1987).

125. The Legislative Council was established by the Hong Kong Charter in 1843 to consider, modify or ratify policy proposals of the Governor and the Executive Council. The Governor must agree to whatever passes the Legislative Council in order for the legislation to become law. All members of the Council were appointees of the Governor until 1984 when a modified system of indirect election for some Councilors was instituted. The first Chinese was not appointed to the Council until 1880 when Ng Choy was appointed. *See* WAI KWAN CHAN, THE MAKING OF HONG KONG SOCIETY 220 (1991). Ng Choy was appointed in response to a petition presented to the Governor by twelve leading Chinese merchants calling for Ng Choy, who had "the confidence of the Chinese community", to be named a Legislative Council member so as "to ensure a mutual good understanding between the ruling class and the ruled." GREAT BRITAIN COLONIAL OFFICE ORIGINAL CORRESPONDENCE CO 129/187 at 56-58. Choy resigned from the Council after serving only three years. ENDACOTT, *supra* note 3, at 203. It was not until 1896 that a second Chinese was to become a Council member. Wei Yuk was the son of one of the wealthiest Chinese merchants, and was educated in England, was a baptized Christian, and had become a true "polished gentlemen." HENRY J. LETHBRIDGE, HONG KONG: STABILITY AND CHANGE 169 (1978). Wei Yuk remained on the Council for 21 years, but it has been reported that he hardly ever actively participated in the proceedings. *See* MINERS, *supra* note 18, at 61. Until 1992, with the arrival of Chris Patten as the expected-to-be-final British Governor of Hong Kong, there was an overlapping membership between the Executive and Legislative Councils. Members of the Executive Council who were also members of the Legislative Council resigned from the Legislature, in accordance with Governor Patten's policy.

Councils).<sup>126</sup> OMELCO sent a special delegation to London to lobby for the Hong Kong people when Parliament was to review the Report.<sup>127</sup> The delegates returned, failing to win rejection of the Foreign Affairs Committee Report, and only 5 of the 24 members of Parliament who spoke during the debate favored OMELCO's position.<sup>128</sup> A special working group of OMELCO issued a statement claiming the Foreign Affairs Committee Report, "will probably go down as one of the most dishonourable statements ever made on Hong Kong ... [and] has discredited the time-honoured British tradition of duty and honour."<sup>129</sup>

But whereas the Hong Kong politicians, British as they may be, *did* criticize the country of Great Britain, the British-dictated *laws* could still be used to stifle the criticism. So, for example, the Hong Kong Television and Entertainment Licensing Authority,<sup>130</sup>

---

126. Governmental civil service employees who were members of the Executive or Legislative Councils were not members of OMELCO. In 1990, there were 46 OMELCO members.

127. The delegation was led by Dame Lydia Dunn, a leading Hong Kong businesswoman and chair of the Hong Kong Trade Development Council. The leading corporate and business executives were united in their support for the right of abode.

128. Even the spokesman for the opposition Labour Party, Gerald Kaufman, spoke against affording the Hong Kong Chinese the right of abode. House of Commons Debate, July 5, 1989.

129. HONG KONG DAILY INFORMATION BULLETIN, June 30, 1989, at 2.

which is empowered to prohibit advertisements of a “political nature”, banned an ad designed to be shown on television, produced by DDB Needham Worldwide Advertising Authority, which described an elementary school Hong Kong Chinese student:

There’s no point in being almost British. The coins in his pocket bear the impression of the Queen. On Saturdays he plays football. His school flies the British flag. He was raised in the British tradition in a British colony. He is one of the millions of people for whom Hong Kong is home. And who want to continue living here. All they want is some form of insurance for the future. And the only form of insurance that will mean anything to them is the right of abode in Britain. Otherwise, being almost British is like being homeless.<sup>131</sup>

Other ads centered on the equally sympathetic Hong Kong soldier:

Another scandal for Whitehall? ... Men who have sworn to die for Britain are now being refused a British passport. Which is, when you think about it, a rather neat way of getting rid of people who have served their purpose ... Betrayal is one word that comes to mind. Like all loyal soldiers of Britain, they have never once questioned their orders or allegiance. They volunteered to serve the British

---

130. The Authority, commonly referred to as the “censor,” is the department of the government responsible for enforcing “standards” in films, theater and television.

131. Tad Stoner, *Review Urged On Ban For Advert*, SOUTH CHINA MORNING POST, July 3, 1989, at 19. Ironically, the British Broadcasting Corporation did run the advertisement as part of its coverage of the controversy, as did the Canadian Broadcasting Corporation. *Id.*, at 2.

Crown. And over the years, they have died for the British Crown.<sup>132</sup>

The reaction among British Government Officials to the anti-British wave of sentiment in Hong Kong ranged from tempered to bitter. The Chair of the Foreign Affairs Committee told the House of Commons: "There are no absolute guarantees for Hong Kong. There never have been and there certainly never will be."<sup>133</sup> But the conservative Monday Club's<sup>134</sup> chair of that Club's Foreign Affairs Committee was more straightforward: "Are these the thanks we receive for taking these people under our wing over the past 100 and more years? Are we to appear before the world as unjust?"<sup>135</sup>

### *C. The Final Stages of British Rule*

---

132. *1,000 British Officers and Men are about to Swear Allegiance to the People's Liberation Army*, Humanist Association of Hong Kong, NEW DIRECTIONS, Issue No. 11, Spring 1995, at 5.

133. *Dishonourable*, SOUTH CHINA MORNING POST, July 1, 1989, at 1.

134. The Monday Club at the time had about 1000 Conservative Party members, including 26 members of the House of Common and 30 members of the House of Lords. '*Outrageous*' *Insult Claim*, SOUTH CHINA MORNING POST, July 5, 1989, at 1.

135. *Id.* (emphasis added).

The British apparently did have one concern about their exclusionary policy: that the highest level Hong Kong Chinese administrators would turn permanently against them. A secret plan was devised; one that did not become public until more than ten years later. To ensure the loyalty of the top civil servants and the police executives, private, individualized secret codes were provided to each of those persons.<sup>136</sup> As the former Secretary for Home Affairs explained in 1993: "People were told that they had to memorize this number and then, if anything went wrong in Hong Kong, they could quote it when they turned up at Gatwick or Heathrow airports and they would be let in."<sup>137</sup> It was hoped that this policy would "stem the overflow of key people in the public and private sectors on whom Hong Kong's stability and prosperity depend."<sup>138</sup>

---

136. *Officials Given Secret Escape Codes to U.K.*, SOUTH CHINA MORNING POST, March 28, 1993, at 1.

137. *Id.* The scheme fell into disuse after a number of years. The Hong Kong administrators had thought they were in fact being provided with a way of obtaining the coveted right of abode. However, the code was designed only to allow for temporary entrance, and, as the Secretary for Home Affairs explained, even that right was "hedged with conditions." *Id.*

138. Comments by Secretary of State for Foreign and Commonwealth Affairs, Douglas Hurd, not in an acknowledgment of this secret scheme but rather in the more general context of the need to offer full citizenship to those Hong Kong Chinese upon whom the British relied for efficient administration of the colony. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, WHITE PAPER ON THE ANNUAL REPORT ON HONG KONG 1989 TO PARLIAMENT, April 18, 1990, at Foreword.

To the Hong Kong Chinese, the desire to keep them out of Britain was rooted in racism.<sup>139</sup> And many British saw it the same way. In London a group of leading economists concluded that the motivation certainly could not be one rationally based in economic concerns. Their analysis -- the *Curry Report* -- examined the worst-case-scenario and assumed all 3.25 million Hong Kong Chinese were to come to the United Kingdom if granted the right of abode. The Report concluded that even were that to be the case, the effects on the labor market would be very beneficial.<sup>140</sup> The proven entrepreneurial talents of the Hong Kong Chinese and the highly skilled, educated employees that would come would actually help solve a shortage of such skills in Britain and "the arrival of Hong Kong people in the United Kingdom could actually save the British Government money."<sup>141</sup>

---

139. The Chinese saw many other examples of British racism as well. For instance, Hong Kong students studying in Britain were designated as "foreigners" -- despite their Commonwealth citizenship status -- and therefore were required to pay considerably higher student fees. For a comprehensive analysis of the policies of Great Britain that were perceived by the Chinese of Hong Kong to be racist, see Richard Klein, *Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong* 18 HASTINGS INT'L & COMP. L. REV. 223 (1995).

140. *Report Proves UK Can Afford Abode*, SOUTH CHINA MORNING POST, July 2, 1989, at 1.

141. *Id.* The issuance of the Report certainly did not stop the racist rhetoric. For example, a former Cabinet member told the House of Commons that "great waves of [Chinese] immigration by people who do not share our culture, our language and our ways of social conduct" would be a "destabilizing factor in society." Comments of Norman Tebbit, *reported in* ECONOMIST PUBLICATIONS, COUNTRY REPORT: HONG KONG 23 (1990).

It certainly has historically been the case that those who have chosen to leave Hong Kong have been among the best educated.<sup>142</sup> For example, the Secretary of State for Foreign and Commonwealth Affairs, Douglas Hurd, reported that emigration from Hong Kong in 1990 had reached a record high, an increase of almost 50% from that of 1989, and that those who left were among the best educated and qualified people in Hong Kong.<sup>143</sup> A separate survey revealed that over 50% of emigrants were from the professional or managerial classes.<sup>144</sup> In reality, many of those who left may not have done so if they would have been granted the right of abode in Britain. Some left to settle for several years and obtain a passport of a foreign country -- typically Canada or Australia -- and then planned to return to Hong Kong knowing that they had a safety net, an escape valve, an option to leave if the situation in Hong Kong deteriorated after 1997.

By 1994, 77% of the 1000 highest ranking Chinese civil servants had obtained a foreign passport.<sup>145</sup> The desperate desire

---

142. It is because of this that some economists have expressed great concern about the effect of emigration on the economic well-being of Hong Kong. *See, e.g.,* The Report prepared by Price Waterhouse Management Consultants, *THE IMPACT OF EMIGRATION ON THE ECONOMY OF HONG KONG* (1989) (emigration could reduce the economic growth of Hong Kong by 45% prior to 1997).

143. *See* ANN. REP. TO PARLIAMENT, at 4 (1990).

144. *See* STEVEN DAVIES & ELFRED ROBERTS, *POLITICAL DICTIONARY FOR HONG KONG* 33 (1990).

for *some* alternative was illustrated by the reaction in Hong Kong to an offer by the Singapore Government, within days of the British Foreign Affairs Committee Report, to accept as residents up to 25,000 blue and white collar Hong Kong employees. Huge crowds immediately gathered at the Singapore Commission Offices in Hong Kong, and police had to be called to dispense the more than 10,000 who had gathered demanding the appropriate forms.<sup>146</sup> In an ironic statement to Parliament, the British Secretary of State Douglas Hurd steadfastly supported his country's refusal to allow the Hong Kong Chinese to emigrate while nevertheless acknowledging the tragic consequences: "Many are leaving Hong Kong only in order to obtain the issuance of a foreign passport. If they could acquire such an assurance without leaving Hong Kong, they would much prefer to stay."<sup>147</sup> Those who did obtain foreign passports were generally among the wealthiest Hong Kong residents. Their passports gave them extra security and privileges as evidenced by the attack on some of these individuals by the Governor of Hong Kong, Christopher Patten. Patten responded to criticism of him by the 'business elite' in the following manner: "They wouldn't be doing it if most of them didn't have foreign passports in their own back pockets."<sup>148</sup>

---

145. Simon Holberton, *Two Stones Roll into China's Path to HK*, THE FINANCIAL TIMES, Feb. 25, 1994.

146. *Singapore Rush*, THIS WEEK IN HONG KONG, July 10-16, 1989, at 1. Singapore proceeded to inform the Hong Kong residents that in the future, only postal applications would be received. *Id.*

147. *See supra* note 137, at 6.

148. *Patten Vents Fury on Tycoons*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, May 11, 1996, at 1.



Britain, of course, in light of the massacre at Tiananmen, could not permit itself to be perceived internationally as either unaware of the threat that Chinese sovereignty posed to Hong Kong, or to not care at all. Therefore, the Foreign Affairs Committee Report acknowledged the Chinese "ruthless suppression" of the pro-democracy movement within China,<sup>149</sup> while still maintaining that there was no need for British immigration policy to reflect this concern because, "the fact remains that the PRC will be driven, in its own long-term interests, to do all it can to maintain a prosperous and stable Hong Kong."<sup>150</sup> The Secretary of State for Foreign and Commonwealth Affairs added, in an attempt to soothe the concerns of the Hong Kong Chinese: "If things did go catastrophically wrong,<sup>151</sup> Britain ... would mobilize the international community to help."<sup>152</sup>

---

149. The Report added that "[e]ven at the heart of the Cultural Revolution, the People's Liberation Army did not fire upon peaceful and unarmed demonstrators as they have now done in the streets of Beijing." *Full Text of the FAC Report*, SOUTH CHINA MORNING POST, Special Edition, July 1, 1989, at 1.

150. *Id.* The Report did also acknowledge that "the progress and prosperity of Hong Kong is of enormous importance to the UK and to British interests." *Id.*

151. In fact, Britain had, since 1984, apparently been prepared to save its own in Hong Kong if there were to be an emergency. It's been claimed that lists had been compiled of British officials as well as expatriate businessmen in particularly sensitive positions, who could be quickly evacuated from Hong Kong were such an escape plan to become necessary. See Hugh Davies, *Evacuation Plan*, HONG KONG STANDARD, June 13, 1984; *VIP 'Escape Plan' Rumoured Again*, SOUTH CHINA MORNING POST, Sept. 24, 1984.

The United States Senate, in response to widespread criticism of Britain's policy toward Hong Kong, did proceed to increase the annual quota of immigrants from Hong Kong to 13,000, almost three times the level the year before.<sup>153</sup> The Senate had approved the legislation by a unanimous voice vote within days of the issuance of the Foreign Affairs Committee Report.<sup>154</sup>

There was *some* response by Britain to the criticism. In July of 1990, legislation was enacted which allowed for 50,000 key workers in Hong Kong and their dependents to receive full British citizenship.<sup>155</sup> Subsequent legislation specified the details and operation for selection of the 50,000.<sup>156</sup>

The primary groups which were to benefit from the new laws were high level government servants, professional and financial managers, and police and other security personnel. A point

---

152. HONG KONG GOVERNMENT DAILY INFORMATION BULLETIN, July 3, 1989, at 1 (comments of Sir Geoffrey Howe).

153. THIS WEEK IN HONG KONG, July 10-16, 1989 at 1.

154. *Id.* The next year, Congress passed the Immigration Reform Act of 1990 which further increased the number of Hong Kong residents who could immigrate to the United States to 20,000 per year.

155. British Nationality (Hong Kong) Act (1990). That the Act was relevant to *any* Hong Kong Chinese person could be questioned by the off-putting language introducing the legislation: "Be it enacted, By the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons..." *Id.* at ch. 34, at 1.

156. British Nationality (Hong Kong)(Selective Scheme) Order 1990.

system was designed to evaluate such factors as the import and contribution of an individual's work, the knowledge of the English language, the length of time employed with British institutions in Hong Kong, and how many others in the same occupation have applied for citizenship.<sup>157</sup> Within the first few months of the Act, 50% more people applied in specific job categories than there were places available.<sup>158</sup> Positions allotted for lawyers and research scientists were the most oversubscribed -- 6 times more individuals applied than there were spots available.<sup>159</sup>

---

157. *Hong Kong Warning By Tebbit*, THE TIMES(London) Apr. 3, 1990, at 2. China reacted negatively to Britain's decision regarding the 50,000 Hong Kong Chinese able to receive British citizenship. The Chinese Ministry of Foreign Affairs condemned the British action, and a spokesperson stated that irrespective of the British move, all Hong Kong Chinese were *Chinese* and not *British* citizens. *UK Abode Decision Protested*, BEIJING REVIEW, April 23-29, 1990, at 11. By 1994, however, the People's Republic no longer ignored the significance of the Hong Kong Chinese obtaining British nationality; it was made clear that in order to hold a major position in the Hong Kong Special Administrative Region after 1997 an individual who had received the right of abode must relinquish all claims of a British nationality. Doreen Cheung, *No Top Assurances for Key Officials*, SOUTH CHINA MORNING POST, March 31 1994, at 1.

158. Report of Douglas Hurd, ANN REP. ON HONG KONG TO PARLIAMENT (1990) April 26, 1991, at Foreword. This "lottery" was not well received by many in Hong Kong. See e.g. *1,000 British Officers and Men are about to Swear Allegiance to the People's Liberation Army*, Humanist Association of Hong Kong, NEW DIRECTIONS, Issue No. 11, Spring 1995, at 5 (the British are only making the situation worse by instituting lotteries).

159. Victoria Finlay, *UK Passport Seekers Urged to Try Again*, SOUTH CHINA MORNING POST, June 12, 1993, at 3. This "lottery" was not well received by many in Hong Kong. See e.g. *1,000 British Officers and Men are about to Swear Allegiance to the People's Liberation Army*, Humanist Association of Hong Kong, NEW DIRECTIONS, Issue No. 11, Spring 1995, at 5 (the British are only making the situation worse by instituting lotteries).

In February of 1997, Britain finally acted to open the door to the ethnic minorities who had lived in Hong Kong for years, and in many cases, generations. It had appeared that these minorities -- mostly East Indians<sup>160</sup> -- might be stateless after July 1, 1997 because under the BASIC LAW which is to govern the Hong Kong Special Administrative Region, it was unclear whether anyone not of Chinese ancestry could be considered citizens.<sup>161</sup> THE CHINESE MEMORANDUM TO THE JOINT DECLARATION BETWEEN GREAT BRITAIN AND CHINA states that, "Under the Nationality Law of the People's Republic of China all Hong Kong *Chinese* compatriots ... are Chinese nationals."<sup>162</sup> The passports of the non-Chinese minorities had been designated British national (Overseas) passports and did not entitle the holder to the right of abode in Britain. The position of the Indian Government was clear in that these long-time residents of Hong Kong would not be able to claim Indian citizenship.<sup>163</sup>

---

160. Approximately 2% of the population of Hong Kong are of Indian, Pakistani or Malaysian ancestry. Hong Kong Government, HONG KONG 1991 373 (1991).

161. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (April, 1990). The BASIC LAW is viewed as providing a framework for the future constitution of the Hong Kong Special Administrative Region.

162. ELABORATION BY THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OF IT'S BASIC POLICIES REGARDING HONG KONG (Sept., 1984)(emphasis added).

163. See e.g., comments by the Indian Minister of State for External Affairs, Kamala Sinha, as reported in, *Indians Reminded of Legal Position*, SOUTH CHINA MORNING POST, June 30, 1997, at 6.

The *Convention on the Reduction of Statelessness*, to which Britain is a Contracting Party, states that “a Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.”<sup>164</sup> There is an additional obligation under the Convention: when a Contracting State [Great Britain] enters into a treaty with a non-party state [the Peoples Republic of China], the Contracting State is to attempt to ensure that no person shall become stateless as a consequence of any transfer of land provided for in the treaty.<sup>165</sup> Years of pressure by Indian groups both in Hong Kong and in Great Britain, supported by a wide-range of Hong Kong Chinese and English politicians, had proved to be fruitless until the British government finally relented and determined that the minorities would qualify for full British citizenship.<sup>166</sup>

#### CONCLUSION

---

164. CONVENTION ON THE REDUCTION OF STATELESSNESS, Aug. 30, 1961, 989 U.N.T.S. 175, at Art. 8 § 1 (registered, Dec. 13, 1975).

165. *Id.* at Art. 10 § 1.

166. *Minorities Win Passports*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Feb. 8, 1997, at 1. It was reported that insecure Indian residents had acted to protect their assets by sending them to Singapore. *New Delhi Predicts Business as Usual*, HONG KONG STANDARD, June 27, 1997, at 4.

The right of abode issue continued to be a dominant concern in Hong Kong in the days leading up to the transfer of the territory to China in July 1997. The Governor appointed by Britain in 1992 to preside over the period leading to the transition, broke with Britain over the passport issue. Governor Patten in late 1995, called upon Britain to alter its policies and to grant more than three million Hong Kong Chinese the right to live in Britain.<sup>167</sup> The Governor's comments were widely perceived of as an attempt to boost his sagging popularity in Hong Kong, and London immediately rejected his proposal.<sup>168</sup> The Governor responded to the clear futility of his plan: "All of us are pretty realistic about the prospects, but it doesn't mean that we can simply walk away from the argument."<sup>169</sup> But "walk away" is exactly what many British think he should have done. The largest circulation daily London newspaper had as its headline: "Crazy Patten", and its editorial elaborated: "[Patten] has been sitting in the midday sun. What else would explain the ludicrous outpouring from the Governor of Hong Kong... we have a few problems of our own in the old country: unemployment and the health service for a start. Patten's plan is Hong Kong phooey."<sup>170</sup>

---

167. *Rage at Patten's Abode Call*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Sept. 30, 1995, at 1.

168. *Id.* The British Home Secretary rebuffed the Governor by responding: "There is no question of our doing that. These matters were extensively discussed and debated in 1990 before Parliament. Firm decisions were reached then ... We don't intend to change it." *Id.*

169. The reaction of China to the proposal was unequivocal: "[Patten] is lying to the people of Hong Kong. It's a dishonest and poor show for him to do something which he knew he could not achieve." Comments of Chen Zuo'er, Chinese member of the Sino-British Joint Liaison Group, *as reported in* SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Sept. 30, 1995, at 1.

A survey conducted by a faculty member at the Chinese University of Hong Kong in 1991 found that only 20.2% of the Hong Kong Chinese 'trusted' their British rulers.<sup>171</sup> It's certainly not hard to understand such a negative reaction by those who felt shunned, unwanted and uncared for because of their race.<sup>172</sup> Britain had arranged a future for the Chinese in Hong Kong without ever ascertaining whether the people wished their land to be given over to the People's Republic of China. There was to be no self-determination for the people of Hong Kong.

---

170. *Tabloids Scoff at Stand of Last Emperor*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Sept. 30, 1995, at 2. The highly respected British publication *The Guardian* concluded that by making his proposal, Patten had ruined any plans he might have had to reenter British politics. *Id.*

171. *Cited in* JOSEPH Y.S. CHENG AND PAUL C.K. KWONG, eds., THE OTHER HONG KONG REPORT (1992), at XXII-XXIII. This is not to imply that prior to the right to abode issue there was great admiration for the British. As Sir Henry May, the Governor of Hong Kong in 1913, admitted in a then-secret dispatch to London, the word "animosity" would best characterize "the real feelings of the mass of the population towards Englishmen in this Colony." GREAT BRITAIN COLONIAL OFFICE OFFICIAL CORRESPONDENCE 129/402 282-283 (April 30, 1913).

172. Britain has continually, officially, refused to acknowledge the negativity with which the Hong Kong Chinese view British rule. In what seemed to be almost an Alice-in-Wonderland-like statement, the British Foreign Secretary, in the final such official visit to the colony of Hong Kong told the Hong Kong Chinese: "Hong Kong will remain Britain's business for long after the handover. That is our wish and our pledge. On the issues that matter, now, for the next month, next year and on into the next millennium, Britain will be there for Hong Kong." *Rifkind Pledges Britain Will Continue to Speak Up for Hong Kong*, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Feb. 22, 1997, at 1. An editorial in the highest circulation English language Hong Kong newspaper responded: "Britain may be anxious to leave Hong Kong 'with honour' but its words now seem hollow." EDITORIAL, SOUTH CHINA MORNING POST INTERNATIONAL WEEKLY, Feb. 22, 1997, at 10.

The door to the country which has ruled the Chinese in Hong Kong for over 150 years was shut right in their faces. By the passage of a series of racially-motivated immigration laws, Britain refused to allow a refuge for the Chinese in case the future that Britain had arranged for them proved to be insufferable.<sup>173</sup>

---

173. Contrast this to the neighboring Portuguese-administered territory of Macau where over 25% of the 455,000 residents actually possess full Portuguese passports. *Enclave to Regain its Mantle as Only Foreign-Controlled Territory on Chinese Soil*, SUNDAY HONG KONG STANDARD, June 29, 1997, at 8. Macau, which has existed as a Portuguese settlement since 1557, reverts back to China on December 19, 1999. In 1981, Portugal enabled anyone born in Macau to obtain a Portuguese passport, and from 1981 to the present, any child who is born in Macau to one parent who had become a Portuguese citizen is also entitled to a Portuguese passport. It is ironic that these Chinese living in Macau, unlike those Hong Kong Chinese, *can* move to and settle in Britain since Portuguese citizens are able to live anywhere within the European Union.



